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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 965

SAMUEL B. JOHNSTON,

Petitioner,

vs.

BOARD OF DENTAL EXAMINERS, D. C., ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

ALVIN L. NEWMYER,
Counsel for Petitioner.

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BOARD OF DENTAL EXAMINERS, D. C., ET AL.

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To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel B. Johnston, respectfully shows to this honorable court, as follows:

Petitioner is a practicing dentist in the District of Columbia where he has engaged in practice for more than twenty-five years. For many years prior to the passage of the Dental Act of 1940[1] he advertised in local newspapers, thereby informing the public as to the location of his office, concerning his rates for certain types of dental treatment

[1] Act of July 2, 1940, 54 Stat. 716, c. 513.

and that he gave free dental examinations. He never advertised anything that was false. His office is located on the second floor of a downtown building situated in a busy part of the city. On the outside walls of the building he has for many years maintained several signs, four feet by six feet in size, on which the lettering varies from four to eight inches in height. At the entrance of this building he displayed some of his sample laboratory work in a small show case.

Following the passage of the Dental Act of 1940, the appellees, constituting the Board of Dental Examiners, D. C.[2] appointed by the Commissioners of the District of Columbia, promulgated seven rules and regulations concerning the practice of dentistry (R. 2, 9, 10). These regulations purported to do the following: limit the size and number of signs that a dentist may display (Regulations 1 and 2 (R. 9)); limit the content and structure of such signs (Regulations 3, 4 and 5 (R. 9, 10)); and limit newspaper advertising to a single card not exceeding two and one-quarter inches in width and one inch in height (Regulation 7 (R. 10)). These regulations were promulgated by the Board on the basis that they were in furtherance of the authority delegated to the Board by the said Dental Act of 1940.

Under said Act and regulations petitioner was confronted with possible criminal prosecution and revocation of his license to practice if he continued to maintain the signs on the building where his office is located and by continuing to advertise in the local newspapers. In order to determine the validity of said Act and regulations, as applied to the petitioner's activities in the practice of dentistry, he filed suit in the District Court of the United States for the Dis-

[2] The Board was authorized by the Act of June 6, 1892, 27 Stat. 42, c. 89; as amended June 7, 1924, 43 Stat. 599, c. 315 and July 2, 1940, 54 Stat. 716, c. 513.

trict of Columbia for (1) a declaratory judgment to determine his right to engage in certain of the acts apparently prohibited by the Act and regulations, and (2) for injunctive relief against their threatened enforcement (R. 1-10). Petitioner contended that the Dental Act of 1940 was repugnant to the due process clause of the Fifth Amendment and that the regulations were invalid because (a) they bore no reasonable relation to the protection of public health or safety and (b) because they were indefinite, arbitrary and capricious and were designed to set up a standard of conduct for the pecuniary advantage of certain individuals engaged in the practice of dentistry to the exclusion of others, on grounds bearing no reasonable relation to the general public interest.

The District Court peremptorily ruled that the Act was valid (R. 15) and, after taking testimony bearing on the reasonableness of the regulations, ruled that the regulations were reasonable, valid and enforceable (R. 15, 16). Petitioner's complaint was accordingly dismissed (R. 16).

On appeal to the United States Court of Appeals for the District of Columbia the judgment was affirmed on January 18, 1943, in an opinion written by Mr. Justice Vinson (R. 18).

Question Involved.

The question involved is whether Section 11, paragraphs (d) and (h) of the Dental Act of 1940 and the regulations promulgated by the appellees are repugnant to the due process clause of the Fifth Amendment insofar as:

(1) Any kind of truthful newspaper advertising that exceeds 2¼ inches by 1 inch in size is prohibited, and

(2) The regulations provide an arbitrary and capricious limit on the size of signs which a dentist may maintain at his office location.

Statute Involved.

Paragraphs (d) and (h) of Section 11 of the Dental Act of 1940 provide as follows:

> "Sec. 11. The District Court of the United States for the District of Columbia may revoke or suspend the license of any dentist in the District of Columbia upon proof satisfactory to said court—
>
> (d) That the holder thereof is guilty of advertising professional superiority or the performance of professional services in a superior manner; advertising prices for professional service; advertising by means of large display, glaring light signs, or containing as a part thereof the representation of a tooth, teeth, bridgework, or any portion of the human head; employing or making use of solicitors or free publicity press agents directly or indirectly; or advertising any free dental work, or free examination; or advertising to guarantee any dental service or to perform any dental operation painlessly * * *
>
> (h) That such holder is guilty of unprofessional conduct.
>
> The following acts on the part of a licensed dentist are hereby declared to constitute unprofessional conduct:
>
> (1) Practicing while his license is suspended.
>
> (2) Willfully deceiving or attempting to deceive the Board or their agents with reference to any matter under investigation by the Board.
>
> (3) Advertising by any medium other than the carrying or publishing of a modest professional card or the display of a modest window or street sign at the licensee's office, which professional card or window or street sign shall display only the name, address, profession, office hours, telephone connections and, if

his practice is so limited, his specialty: Provided, That in case of announcement of change of address or the starting of practice, the usual size card of announcement may be used. The size of said cards or signs shall be designated by the Board."

A copy of the regulations promulgated by the appellees is set forth in the Record (R. 9, 10).

Reasons Relied On for Allowance of the Writ.

Petitioner relies on the following grounds why a writ of certiorari should be granted to review the decision of the United States Court of Appeals for the District of Columbia.

(1) The constitutional right to free speech is violated by the unreasonable limitation on the petitioner's right to engage in truthful advertising.

(2) The Board of Dental Examiners, D. C., an administrative body appointed pursuant to an Act of Congress, has adopted regulations which are arbitrary and capricious in relation to petitioner's practice of dentistry.

(3) The question presented involves the limits to be placed upon the decision of this Court in *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608, 79 L. Ed. 1086.

Prayer.

Wherefore your petitioner prays the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia in this case there entitled *"Samuel B. Johnston, appellant* v. *Board of Dental Examiners, D. C. et al., appellees, No. 8076"*, that said cause may be reviewed and determined by this Court, and that the judgment of

the United States Court of Appeals for the District of Columbia may then be reversed.

SAMUEL B. JOHNSTON,
Petitioner,

By ALVIN L. NEWMYER,
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BRIEF IN SUPPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia will be found beginning at page 18 of the Record. It has not yet been officially reported.

Jurisdiction.

The decision of the United States Court of Appeals for the District of Columbia was rendered on January 18, 1943. The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. A. Sec. 347 (a).

Question Presented

The question involved is stated in the petition, *supra.*

Specification of Errors.

The United States Court of Appeals for the District of Columbia erred in the following respects:

1. In holding that Regulation No. 7 promulgated by the appellees, which limited the size of a newspaper advertisement to a single publication not exceeding 2¼ inches by 1 inch, was valid.

2. In holding valid Regulation No. 1, promulgated by the appellees, which limited a licensed dentist to only two signs displayed or exposed to view of the general public at his office and which provided that such signs must not exceed 48 inches in length by 6 inches in width, if the sign is placed parallel to or flush with the building, or not more than 24 inches in length and 6 inches in height, if the sign is at an angle to the building.

ARGUMENT.

I.

Regulation No. 7 is an unconstitutional limitation on petitioner's right to advertise.

Regulation No. 7 [3] limits the size of any newspaper advertisement published by a licensed dentist to a single insertion in a newspaper of an ad which does not exceed 2¼ inches by 1 inch, or 2¼ square inches in area. The Dental Act of 1940 does not prohibit newspaper advertising in the manner limited by Regulation No. 7. Section 11 (h) (3) of the Act however uses broad language in declaring that unprofessional conduct for which one's license is liable to revocation or suspension may result from "Advertising by any medium other than the carrying or publishing of a modest professional card * * * which * * * shall display only the name, address, profession, office hours, telephone connections, and, if his practice is so limited, his specialty * * * The size of said cards shall be designated by the Board." This provision of the Act is the authority relied upon by the Board for the promulgation of Regulation No. 7. Accordingly, the publication by a licensed dentist of a newspaper ad 3 inches by 5 inches would constitute unprofessional conduct for which his right to practice would be subject to suspension or revocation.

It is significant to note that newspaper publication as such is not prohibited. No deleterious effect on public safety or health was considered likely to result from the

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[3] "A licensee may publish a modest professional card in the newspapers or publications of the District of Columbia. This card shall contain only such information as provided in Section 11, Paragraph h, Subdivision 3. The size of this card shall not exceed two and one-fourth inches (2¼") in with and one inch (1") in height. No more than one such card may be published in a copy of any newspaper or publication at one time."

express allowance of such publication. The question here presented is whether the limitation contained in Regulation No. 7 can be said to bear any reasonable relation to public health or safety.

In the opinion of the United States Court of Appeals for the District of Columbia, the only references to this phase of the case are contained on page 2 of the opinion (R. 19):

> "The Board * * * was specifically authorized to designate the size of cards and signs * * * The licensee is limited to a single advertisement, not to exceed two and one quarter inches in width and one inch in height, in a copy of any newspaper or publication at one time * * * The limitation on newspaper advertising is a reasonable regulation under the terms of the Act."

Nothing more is said in the opinion on the entire problem of newspaper advertising here presented. The balance of the court's opinion deals with the reasonableness of the regulations relating to the size of signs permitted on buildings in which the dental office is located.

The right to advertise in newspapers may well be subject to some limitation where limitation has relation to the content of a publication which may have an adverse effect on public health or safety. The statutory limits on the content of any advertisement published by a dentist are specified in Section 11 (h) (3) of the Act. For present purposes it is assumed that the content of the publication may be limited on public health and safety grounds. No such reason, however, is applicable to the size of such publications.

The size designated in Regulation No. 7 is unreasonably small in that it permits only a 1 inch ad one column in width. Because of the total lack of any sound relationship between the size of newspaper ads, containing concededly proper information, and public health or safety, it is re-

spectfully submitted that the limitation contravenes the due process clause of the Fifth Amendment.

II.

Regulation No. 1 which places a limitation on the size of building signs is invalid.

Regulation No. 1 appears at page 9 of the Record. Regulation No. 3 provides that the building sign or signs of a dentist shall contain only the information authorized by Section 11 (h) (3) of the Dental Act. Only two signs are permitted to be displayed for public view, neither of which is permitted to be larger than 288 square inches or 48 inches in length, if flush with the building, or larger than 144 square inches or 24 inches in length, if at an angle to the building. In either case the size of lettering is limited to 3 inches in height.

Petitioner contends that the Board was not given authority by the Dental Act to prescribe the number of signs, but only the size, and that the prescribed size is too small in the light of the physical location of petitioner's office. That the Board went beyond the authority delegated to it by the Act in prescribing the number of signs which a dentist may display is clear. The last sentence of Section 11 (h) (3) of the Act provides that "The size of said cards or signs shall be designated by the Board." The Court of Appeals stated "that the regulation dealing with size is a nullity if it permits the licensee to accomplish through multiplicious production the effect which is denied to a single display." This disposition of the question by the Court of Appeals is not believed to be a proper solution. The fact is that the Board was authorized by the Act to adopt a regulation as to size. If it was intended that it should also have the authority to determine the number of signs, that could have been clearly provided for in the Act.

In connection with another aspect of the size of signs, the Court of Appeals said, at page 5 of its opinion (R. 22), "that had Congress inflicted upon the Board the task of determining the size of each individual advertisement, based upon the particular location of and the condition surrounding an office, it would have been stated in clear terms." To the same extent, it is submitted, if Congress intended the Board to designate the number of signs, that could also have been clearly stated. It does not follow that the failure to so state means that the word "size" means "aggregate size." This assumes that one could post five signs, each being 1/5 of the total allowed square area. But this assumption is not correct because more than two signs are prohibited, irrespective of size. In all deference to the Court of Appeals, it is urged that, apart from the reasonableness of the regulation as to size, the limitation as to number is clearly invalid and the courts below should have so held. The trial court did make a general finding that the size of the signs was reasonable (R. 15). No finding was made that the size of the signs maintained by the petitioner was not reasonable. The regulations make no distinction between the locality in which the dental office is located, the size of the building, or the nature of the obstructions to the view thereof. The size fixed by the regulation is thus arbitrary and not related to the needs of the particular case. The Court of Appeals opinion recognized this, but said that there is nothing in the Act to require the Board to consider each licensee separately and "if a general dimensional regulation of this character is reasonable, if it substantially effectuates the purpose of an Act designed to promote the public health and safety, it cannot be considered to contravene the guarantees of the Fifth Amendment." That dimensional regulation of signs, such as are involved in the case at bar, is directly related to public health and safety is a proposition which is as-

sumed but not supported by reason or authority. The long line of cases limiting the size of billboards are authoritative only insofar as they hold that large physical structures of a temporary nature may constitute dangers to public safety. But in that line of cases it is clear that limitation of the size of billboards applies to all billboards, irrespective of whose advertising is displayed. The general application of such dimensional limitations are clearly based on public safety considerations. The limitation in the case at bar, it is respectfully urged, is sought to be justified as a public safety measure when in fact public safety is not a moving consideration to any extent. Larger signs may be maintained on the same building by one who is not a dentist, than those which the dentist is permitted to maintain. The attempted justification of the limitation of size on public safety grounds fails. The only basis remaining is the alleged relationship of the size of signs to public health as an instrument in controlling the various activities incident to the practice of dentistry. No relationship between the two exists in the case at bar.

A statute is invalid if its purported regulation bears no reasonable relationship to some public interest it seeks to protect.

Smith v. *Texas*, 233 U. S. 630, 58 L. Ed. 1129;
In re Wilshire, 103 F. 620.

III.

Petitioner's right to engage in truthful advertising was erroneously held by the court below to be governed by the decision of this Court in Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608, 79 L. Ed. 1086.

The case at bar presents a need for reexamination of the decision in *Semler* v. *Oregon State Board of Dental Examiners, supra,* insofar as the principle of that case was

applied to the case at bar by the trial court and the Court of Appeals. The Dental Act of 1940 was largely patterned after the Oregon statute involved in that case. That case involved advertising by a dentist of (a) professional superiority, (b) prices, (c) free examinations, (d) guaranteed dental work, and (e) painless dentistry. Although some of these propositions were urged in the trial of the case at bar, the points finally relied upon by the petitioner in the trial court and the principle points submitted in the Court of Appeals related to the same points now urged on this appeal, namely, petitioner's right to publish in newspapers the information permitted by the statute by single publications larger than 2¼ inches by 1 inch and his right to maintain the signs on the building where his office is located.

It is submitted that the questions presented to the Court of Appeals were not decided in the *Semler* case, although that case was held to be authoritative in the present case.

The concept that the public interest is adversely affected by the type of advertising prohibited by the decision in the *Semler* case is not here being questioned.

The error in the present case lies in holding that the publication of one's *name, address, profession, office hours, telephone connections* and *specialty,* each of which is expressly permitted by the statute, can not have an adverse effect on public health or safety when such publication is in an ad of the permitted size, 2¼ inches by 1 inch but can have such effect in an ad five times that size. The ratio decidendi of the *Semler* case was that professional boasting, even if truthful, would tend "to lure the credulous and ignorant members of the public to their (dental) offices for the purpose of fleecing them," which is also characterized as "bait advertising." There is a clear relationship between that type of advertising and the public in-

terest, but none between permitted advertising of a limited size and the same advertising of a larger size.

The opinion of the Court of Appeals, at page 3 (R. 20), draws as a "near analogy" to cases involving regulation of the size of billboards. The analogy is none too clear for the reason that in the billboard cases the regulation of size is justified by public safety considerations, in that a billboard that is too large is per se a danger to the public. In no case which has been found has the size of the billboard been limited by any consideration of regulation of the business of the advertisers. Regulating the size of billboards would be analogous to regulating the size of newspapers in which ads are published, if any public safety factor existed in connection with the size of a newspaper.

Petitioner submits that no public interest is affected by the size of the permitted type of advertising. The fact that an association of dentists in the District of Columbia has considered it desirable to limit the size of that type of advertising, which is neither "bait advertising" nor characteristic of the conduct of the charlatan, and thus incorporated such principle into the regulations governing the practice of dentistry, is no justification therefor. The adoption of a principle of so-called professional ethics may itself amount to a deprivation of due process of law and, in fact, may be illegal. In the recent case of *American Medical Association* v. *U. S.*, decided by this Court on January 18, 1943, 87 L. Ed. 348, 350, this Court said that the plan of operation adopted by the Group Health Association, "was contrary to the code of ethics of the petitioners." In that case, that which a learned profession had announced to be one of its ethical standards was held to result in a criminal conspiracy.

The *Semler* case is, therefore, not believed to be authoritative in the circumstances of the present case and was wrongly relied upon below.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the questions presented herein require review of the decision of the United States Court of Appeals for the District of Columbia and, accordingly, a writ of certiorari should issue as prayed for in the petition.

Respectfully submitted,

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(5900)

(13)

MAY 13 1943

CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

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No. 965

SAMUEL B. JOHNSTON, *Petitioner,*

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Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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DIVISION OF PRINTING—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

The facts are sufficiently stated in the petition and will not be repeated.

SUMMARY OF ARGUMENT

Paragraph (d) of Section 11 of the District of Columbia Dental Act of 1940 is copied almost verbatim from the Oregon Dental Law of 1933, the constitutionality of which was sustained by this court in the case of Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608.

Advertising by members of the learned professions, of which dentistry is one, may be absolutely prohibited, since advertising results in unethical competition. Therefore, it follows there can be no constitutional objection to a statute prohibiting dentists from

advertising other than by a modest professional card or the display of a modest window or street sign.

It is immaterial whether the prohibited advertising be true or false.

The power vested in the Board to designate the size of cards and signs necessarily includes the authority to designate the number thereof, as otherwise the limitation as to size would be a nullity. The word "size" must be construed to mean "aggregate size".

The regulations of the Board are reasonable and were so found to be by the court below.

ARGUMENT

I

Paragraph (d) of Section 11 of the District of Columbia Dental Act of 1940 is constitutional.

Paragraph (d) of Section 11 of the District of Columbia Dental Act, approved July 2, 1940, 54 Stat. 716, 718, (Sec. 2-311, D. C. Code, 1940 Ed., Petitioner's brief p. 4) is copied almost verbatim from the Oregon dental law of 1933, the only difference between the two being in the clause relating to solicitors and publicity agents which is not material here, as petitioner does not make use of solicitors or press agents. The constitutionality of the Oregon law was attacked in the case of *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, by a dentist who was engaged in practices strikingly similar to those followed by the petitioner here. Referring to the allegation of the complaint in that case, this court said:

> "Plaintiff alleged in his complaint that he was licensed in 1918; that he had continuously advertised his practice in newspapers and periodicals, and by means of signs of the sort described in the amended statute, and that he had employed advertising solicitors; that in his advertisements he had represented that he had a high degree of efficiency and was able to

perform his professional services in a superior manner; that he had stated the prices he would charge, had offered examination of prospective patients without charge, and had also represented that he guaranteed all his dental work and that his dental operations were performed painlessly. He further alleged that the statements in his advertisements were truthful and were made in good faith; that by these methods he had developed a large and lucrative practice; that through long training and experience he had acquired ability superior to that of the great majority of practicing dentists; that he had been able to standardize office operations, to purchase supplies in large quantities and at relatively low prices, and thus to establish a uniform schedule of charges for the majority of operations; also that he had made contracts for display signs and for advertisements in newspapers, and had entered into other engagements, of which he would be unable to take advantage if the legislation in question were sustained, and, in that event, his business would be destroyed or materially impaired."

This court sustained the validity of the statute, saying:

"The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' The legislature was aiming at 'bait advertising.' 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed" dental work' was, as a general rule, 'the practice of the charlatan and the quack to entice the public.'

"We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing

> with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards."

It is plain that petitioner relies upon the force of his advertising to secure a large proportion of his practice, instead of relying upon a reputation for professional honesty, integrity, skill and ability. He has placed upon his building four signs, 4 feet by 6 feet in size, on which there is lettering 4, 5 and 8 inches in size, as well as a large metal sign hung at an angle, designed for illumination, but no longer illuminated. He also spends from $2500 to $6000 a year for newspaper advertising. (Finding of Fact No. 1 Rec. p. 14) Petitioner further testified that he quit advertising for about 6 months and his business fell off 50 per cent. (Stenographic Transcript, p. 17.) These facts demonstrate that advertising, as said by this court in the *Semler* case, is a practice "which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous."

The United States Court of Appeals for the District of Columbia, in deciding this case, said (Rec. p. 19):

> "The courts have so often sustained identical legislative provisions that we are somewhat surprised at

appellant's apparently serious re-presentation of this argument here."

II

Advertising by dentists, even if truthful, may be regulated or prohibited.

Petitioner contends that a regulation or prohibition of honest and truthful advertising is violative of the due process clause of the Constitution. We are here dealing with advertising by members of one of the learned professions (*Graves* v. *Minnesota,* 272 U. S. 425) and not with the advertising of "traders in commodities". But even truthful advertising of certain commodities may be prohibited. (See *Packer Corp.* v. *Utah,* 285 U. S. 105, where a statute prohibiting the advertising of tobacco products on any bill board, street car sign or placard was sustained). Advertising by members of a learned profession may be absolutely prohibited. *Laughney* v. *Mayberry,* 145 Wash. 146, 259 Pac. 17; *Goe* v. *Gifford,* 168 Va. 497, 191 S. E. 783; *Winberry* v. *Hallihan,* 361 Ill. 121, 197 N. E. 552; *Commonwealth* v. *Brown,* 302 Mass. 523, 20 N. E. 2d. 478. If follows that, if all advertising may be prohibited, it is immaterial whether petitioner's advertising be true or false. In the *Semler* case, supra, this court said: (pp. 611, 612)

> "Recognizing state power as to such matters, appellant insists that the statute in question goes too far because it prohibits advertising of the described character, although it may be truthful. He contends that the superiority he advertises exists in fact, that by his methods he is able to offer low prices and to render a beneficial public service contributing to the comfort and happiness of a large number of persons.
>
> * * * * *
>
> "It is no answer to say, as regards appellant's claim of right to advertise his 'professional superiority' or his 'performance of professional services in a superior manner,' that he is telling the truth. In framing its

policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement. *Booth* v. *Illinois,* 184 U. S. 425, 429; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303; *Pierce Oil Corp.* v. *Hope,* 248 U. S. 498, 500; *Euclid* v. *Ambler Realty Co.* 272 U. S. 365, 388, 389."

See also

Sherman v. *State Board of Dental Examiners,* (Tex. Civ. App.) 116 S. W. 2d 843.
Levine v. *State Board of Registration,* 121 N. J. L. 193, 1 Atl. 2d. 876.
Craven v. *Bierring,* 222 Iowa 613, 269 N. W. 801.

III

The regulations promulgated by the Board are valid.

(a) Petitioner contends that the Board is without authority to provide that a licensee may not publish more than one professional card in a copy of any newspaper or publication at one time and is also without authority to provide that the licensee may not display more than two signs on his building. Subparagraph 3 of paragraph (h) of Section 11 of the Dental Act (Petitioner's brief p. 4) prohibits "advertising by any medium other than the carrying or publishing of a modest professional card or the display of a modest window or street sign at the licensee's office," and provides that "the size of said cards or signs shall be designated by the Board." It will be noted that the statute permits only "a modest professional card" or "a modest window or street sign". Therefore if the Board acted without authority in any particular it was in permitting two signs upon the dentist's premises when the statute seems

to contemplate only one. But even assuming, for the sake of argument, that the words "a modest professional card" or "a modest window or street sign" can be construed to include the plural, certainly Congress, in requiring the Board to designate the size of the cards and signs, did not intend to do a vain thing. If a dentist could plaster his whole building with signs, or if he could fill a whole page of a newspaper with his business cards, without number, the limitation as to size would be a nullity.

It is well settled that statutes will not be given a literal construction if such a construction would produce an absurd or futile result.

In the case of *Haggar Co.* v. *Helvering,* 308 U. S. 389, 394, this court construed the words "first return" to include an amended first return, saying:

> "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided, when they can be given a reasonable application consistent with their words and with the legislative purpose. Hawaii v. Mankicki, 190 U. S. 197; United States v. Katz, 271 U. S. 354; Sorrels v. United States, 287 U. S. 435, 446; Burnet v. Guggenheim, 288 U. S. 280, 285; Armstrong Co. v. Nu-Enamel Corp., 305 U. S. 315, 332-3."

In the case of *Armstrong* v. *Nu-Enamel Corp.,* 305 U. S. 315, 333, this court said:

> "Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law."

If Congress did intend that more than one sign could be permitted or more than one professional card could be inserted in a single edition of a newspaper, then the statute can only be given force and effect by construing the word "size" to mean "aggregate size".

The power of the Board to make regulations is not limited

to the power granted in subparagraph 3 of paragraph (h) of Section 11, but additional authority is found in Section 2 (Sec. 2-302 D. C. Code, 1940 Ed.) which provides in part "The Board shall make and adopt such rules and regulations not inconsistent herewith as it deems necessary to effect the purposes of this Act, * * *". Certainly a limitation of the number of signs and the number of professional cards is necessary to effect the purposes of the Act. As before pointed out, if the number of signs and the number of cards is not limited, the purpose of the Act with respect to size is defeated.

(b) Petitioner further contends that the size of the signs and advertisements prescribed in the regulations is not reasonable. The trial court found to the contrary (Finding of Fact No. 4, Rec. p. 15). The only limitations placed by the statute upon the size of the cards and signs to be designated by the Board is that the card must be modest and that the sign must also be modest and not a large display or glaring light one. While the statute defines in general terms the maximum size of the sign and card it does not fix the minimum. It may be that had the Board prescribed signs and cards so small as to amount to none at all the contention might be sustained that the regulations went beyond the power conferred by the statute. But that is not the case here. Signs which are flush with the building may be 6 inches high and 4 feet long. If the length is less, the height may be greater, provided the sign does not exceed 288 square inches in area. The lettering thereon may be 3 inches in height. Signs which protrude from the building, either perpendicular thereto or at an angle, may be 6 inches high and 2 feet long. If the length be reduced, the height may be increased, provided the sign is not in excess of 144 square inches. The lettering may be 3 inches in height. The professional business card which may be published may be 2¼ inches in width and 1 inch in height.

Bearing in mind that Congress limited the Board only with respect to the maximum of the sizes of the signs and cards to be permitted, and bearing in mind further that Congress could have prohibited all advertising by dentists, it is submitted that the sizes prescribed are not unreasonable.

Petitioner further contends that the regulations of the Board are invalid because they lay down a general rule applicable to all. He argues that there should be a separate regulation for each particular case, taking into consideration the locality of the dentist's office, the size of the building and the nature of the obstructions to the view thereof. Congress plainly intended that the Board designate the size of the signs by a general regulation and not by the exercise of discretion in each particular case. Even if, which we do not concede, petitioner's signs are not harmful because of the various factors upon which he relies, this would not invalidate the regulation.

In the case of *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 389, this court said:

> "Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. Hebe Co. v. Shaw, 248 U. S. 297, 303; Pierce Oil Corp. v. City of Hope, 248 U. S. 498, 500. The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity."

In the case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204, this court said:

> "The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."

Since the trial court found (Finding of Fact No. 4, Rec. p.

15) that "The size of letters fixed by the Board of Dental Examiners are readily visible from the street and the signs sufficient in number", it cannot be said the regulations of the Board are arbitrary. It is, therefore, immaterial whether the Board could, without violating the prohibitions contained in the Act, have permitted signs of the size and number used by petitioner.

CONCLUSION

In considering the questions raised in this case the court must consider the purpose and intent of Congress as expressed in Section 10 of the Act (Sec. 2-310, D. C. Code, 1940 Ed.). This section reads as follows:

> "Sec. 10. The practice of dentistry in the District of Columbia is hereby declared to affect the public health and safety and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified dentists be permitted to practice dentistry in the District of Columbia. All provisions of this Act relating to the practice of dentistry shall be construed in accordance with this declaration of policy."

For the reasons above given it is respectfully submitted that the Act here under consideration is constitutional; that the regulations promulgated thereunder are reasonable and valid, and that the petition for writ of certiorari should be denied.

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